The Honorable Lauren King

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants.	NO. 2:25-cv-00244-LK PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY NOTE ON MOTION CALENDAR: Wednesday, May 21, 2025

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

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ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

I. INTRODUCTION

Defendants refused to respond to Court-ordered discovery. Now they largely concede that their relevance and privilege objections are inadequate. But they insist they can choose not to respond because they have decided the discovery is moot. They are wrong. As this Court recently confirmed, Plaintiffs' contempt-related discovery remains live, and Defendants cannot short-circuit discovery by belatedly un-doing their termination of Dr. Ahrens' grant. Despite Defendants' effort to craft a *per se*, contempt-specific rule of mootness, Plaintiffs' request for monetary sanctions means this remains a live dispute, particularly in light of Defendants' continued terminations of grants following this Court's preliminary injunction. Moreover, it is up to this Court alone to excuse Defendants' compliance with Court-ordered discovery. Defendants cannot unilaterally refuse to respond. This Court should grant Plaintiffs' Motion to Compel and award Plaintiffs their fees in bringing it.[1]

II. ARGUMENT

A. Plaintiffs' Discovery Requests Are Not Moot

Whether HHS acted in contempt of this Court's PI order remains a live issue—as this Court already recognized. Dkt. #273 p.8. This is so for at least two reasons: (1) because Plaintiffs' request for monetary contempt sanctions remains live and (2) because Defendants' decision to reinstate a grant before this Court decided the ultimate contempt issue (while continuing to terminate other grants) does not divest this Court of jurisdiction over Plaintiffs' contempt motion.

Defendants nonetheless suggest there is a *per se* rule that contempt motions necessarily become moot where the specific contemptuous conduct has abated. Dkt. #279 pp.10-11. This is both legally and factually wrong.

[1] Defendants failed to sign their Opposition as required by Federal Rule 11(a). Although the rule provides that "[t]he court *must* strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention," (emphasis added), in the interest of promptly resolving this discovery dispute, Plaintiffs do not object to the Court's consideration of Defendants' unsigned brief.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
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As a legal matter, a live request for monetary relief forecloses mootness. *See, e.g.*, *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002). *Rosenblum*, on which Defendants rely, neatly illustrates this proposition. There, the district court determined that plaintiff's motion was moot precisely because, as "a pro se prisoner, [he] cannot obtain monetary sanctions." *Rosenblum v. Blackstone*, SA CV 18-966-JVS(E), 2020 WL 4258580, at *3 (C.D. Cal. Apr. 21, 2020) (citing cases). Same with *Oakland Cannabis Buyers' Cooperative*. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1112-13 (9th Cir. 1999), *rev'd on other grounds*, 532 U.S. 483 (2001) (holding that appeal from a purged contempt order was moot where "[t]he court neither fined nor jailed members of OCBC as a result of the contempt"). For the reasons Plaintiffs have already detailed, they may be entitled to monetary sanctions in the form of attorneys' fees if Defendants contemptuously violated this Court's PI order. Dkt. #254 pp.8-9.

Defendants protest that Plaintiffs "did not raise" monetary sanctions "in their motion for contempt, and therefore such issues cannot keep their contempt discovery live." Dkt. #279 pp.11-13. This is a strange claim to make when Defendants' contempt opposition explicitly argued against the monetary sanctions Plaintiffs sought and still seek. Dkt. #253 pp.14-15 (arguing that "[t]he Court should not award attorneys' fees"). If and when discovery confirms the seemingly obvious fact that Defendants terminated grants in violation of this Court's PI, Plaintiffs will return to this Court seeking the considerable fees it has undertaken to get Dr. Ahrens' grant reinstated and to hold the government to account.

Defendants' arguments also fail as a factual matter because NIH only reinstated Dr. Ahrens' grant *after* Plaintiffs moved for contempt, and even then, continued to terminate grants that it determined promoted "gender ideology." Dkt #275 pp.6-7. In other words, NIH has continued to violate the PI. Even so, Defendants' urge this Court to disregard its termination of these other grants as "irrelevant," and also insist that these terminations shouldn't be held against them because each of the other eight *additional* times Plaintiffs caught them, Defendants

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

capitulated and reinstated the grants. Dkt. #279 p.14. But there is no rule of law or equity that requires Plaintiffs or this Court to indulge Defendants in their game of whack-a-mole.

All of this aligns with this Court's prior recognition that "necessary and jurisdictionally proper proceedings regarding the scope or enforcement of the preliminary injunction, including the limited discovery this Court has already ordered" are proper to ensure that the Court's preliminary injunction continues to protect the Plaintiffs. Dkt. #273 p.8. Whether Defendants have a plan or policy to terminate grants to institutions providing gender-affirming care, and the basis of any such plan or policy, is necessary to learn so that Plaintiffs can protect themselves against exactly the conduct this lawsuit was instituted to prevent and the Court's preliminary injunction enjoins. Defendants' refusal to respond substantively to compliance-related discovery keeps the Plaintiffs and the Court in the dark, robbing the Court's injunction of its intended effect.

Defendants also suggest there is no reason for discovery into the basis for their termination of Dr. Ahrens' grant (or any other grants), because they have now introduced a document from NIH's former acting Director, Dr. Matthew Memoli, that purports to show that NIH didn't cancel grants pursuant to the EOs, they merely adopted an internal policy that coincidentally followed the EOs precisely. *Id.* But Dr. Memoli's self-serving memo—which is seemingly contradicted by internal documents, Dkt. #276-4, Dr. Memoli's own subsequent memo, Dkt. #276-5, White House reports, Dkt. #278-2, deposition testimony that grant termination decisions came from outside NIH, Dkt. #276-7 pp.20:1-5; 26:13-30:1; 33:24-34:10; 39:8-42:24; Dkt. #276-8 pp.10:3-11:24, and common sense—is precisely the sort of thing that demands further discovery. At a minimum, in addition to obtaining answers to the discovery they already brought, Plaintiffs will now likely need depositions of Dr. Memoli and Dr. Lorsch.[2]

[2] Defendants' declarant, Dr. Lorsch, is now acting in the same role that Dr. Liza Bundesen previously occupied. Dr. Bundesen was in that role at the time Dr. Memoli's memo was purportedly drafted. But in her deposition, Dr. Bundesen testified that termination decisions came from DOGE, not NIH; she made no mention of the Memoli memo and testified that she did not know how termination decisions were made, was not aware of

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

Defendants cannot resist Plaintiffs' discovery by introducing evidence that requires testing via the very discovery Plaintiffs seek.

Here the evidence shows not only that Defendants terminated grants in violation of this Court's order, but that they may have subsequently misrepresented the circumstances surrounding those terminations to the Court. Discovery remains appropriate to determine whether Defendants' conduct merits sanctions.

Finally, whether or not Plaintiffs may ultimately be entitled to a contempt finding or sanctions, the discovery at issue in this motion is clearly not moot in any jurisdictional sense. The Court specifically ordered that Plaintiffs may take it and re-affirmed as much in its recent stay order. That is entirely within the Court's power—and Defendants' make no argument to the contrary. Given this Court's clear direction, Defendants cannot unilaterally determine they'd rather not do discovery.

B. None of Defendants' Remaining Objections Justify Their Failure to Respond

As detailed in Plaintiffs' motion, Defendants' naked objections come nowhere near justifying their total failure to respond to discovery—indeed, they don't even suffice to preserve Defendants' objections. Dkt. #275 pp.9-10. Defendants' Opposition fails to fix the problem.

1. Defendants largely concede their relevance objections

To start, Defendants make no effort to explain their relevance objections. Instead, they claim their relevance objections only applied to the extent Plaintiffs' discovery requests were construed as merits discovery, rather than compliance discovery. Dkt. #279 p.15. Thus, Defendants appear to concede that Plaintiffs' requests are relevant for the compliance purpose for which they were promulgated. And even if they had not, their failure to substantively justify them operates as a concession as well. *See Kuykendall v. Les Schwab Tire Ctrs. of Wash., Inc.*, 2:20-CV-00154-SMJ, 2021 WL 6275066, at *2 (E.D. Wash. June 30, 2021).

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anyone at NIH having input into terminations, and was not aware of any NIH policy not to fund research into gender-affirming care. Dkt. #276-8 pp.9:19-23; 10:3-11:24; 16:10-16.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

Defendants offer argument on only two of their relevance objections, to Requests 9 and 10 of the Bulls SDT. Dkt. #279 p.16. Request 9 seeks "[a]ll documents in your possession, custody, or control, including communications, policy statements or guidance documents related to or referencing Executive Order 14,168 . . . or Executive Order 14,187[.]" Dkt. #276-11 p.7. It is hard to imagine what documents Defendants might have in mind that relate only to irrelevant portions of the EOs. They certainly don't indicate what, if anything, they contend falls into this bucket, as they were required to do. But more broadly, to the extent Defendants contend this is overbroad insofar as it covers "aspects of the referenced Executive Orders not at issue in Plaintiffs' Amended Complaint," Dkt. #279 p.16 (quoting *id.*), that doesn't explain what Defendants actually did, which was refuse to respond *at all*.

Request 10 seeks "[a]ll communications between [Ms. Bulls] and any person(s) affiliated with the Department of Government Efficiency, related to NIH grant funding." Dkt. #276-11 p.7. Here, Defendants object that "'any person affiliated with the Department of Government Efficiency' is vague and ambiguous" and therefore the request "imposes a requirement . . . to undertake a review of information and make determinations that are not apparent on the face of the documents being requested." *Id.* pp.7-8. That is, Defendants would have this Court believe that Ms. Bulls had no way of knowing *who* in her email inbox was affiliated with DOGE, and indeed, that the burden in trying to figure that out justifies a complete refusal to provide documents. Except Ms. Bulls' own testimony indicates that she was well aware when DOGE affiliates were included on emails she received. Dkt #276-7 pp.18:24-19:6; 20:3-14 (recalling specific email related to grant terminations where DOGE personnel was copied). And on top of that, the notion that the Department of Justice doesn't know or can't figure out the names of DOGE employees, is absurd on its face. All to say, to the very limited extent Defendants try to defend their objections, they fall flat.

2. Defendants' privilege objections, even if preserved, are unsupportable

On privilege, Defendants suggest it should be obvious that Plaintiffs requests sweep in some privileged material, and thus their objections were adequate. Dkt. #279 pp.16-17. This misses the point entirely. Even if some requests can be read to include some privileged material, Defendants must—obviously—still produce the non-privileged materials. There is no doubt such materials exist. Dkt. #275 pp.12-14. And for any documents that Defendants contend are covered by privilege, they must produce a log to support those privilege claims and give Plaintiffs an opportunity to challenge. Fed. R. Civ. P. 26(b)(5). Defendants here went 0 for 2: they failed to produce non-privileged documents and failed to produce a log. Given Defendants' dismissive refusal to follow the rules in responding to Court-ordered discovery or to defend its overbroad privilege assertions, this Court is well within its discretion to find that Defendants have waived their objections. *See Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (concluding that whether privilege is waived should be evaluated "in the context of a holistic reasonableness analysis, intended to forestall needless waste of time and resources, as well as tactical manipulation of the rules and the discovery process"). But even if this Court finds Defendants have preserved these objections, Defendants must still produce non-privileged documents and a log.

C. Plaintiff States Are Entitled to Their Fees for Bringing this Motion

Defendants contend their refusal to respond to Court-ordered discovery was "substantially justified." Dkt. #279 p.18. Nonsense. Defendants' refusal and threadbare objections violate at least two Court orders, clear dictates of the Federal Rules of Civil Procedure, and basic tenets of discovery. There is no justification for their cavalier disregard in this case. This Court should award the State its fees.

Defendants request that, if this Court awards fees, they have an "opportunity to address the appropriate fee amount after Plaintiffs complete their submission by providing timesheets." Dkt. #279 p.18 n.5. Plaintiffs' timesheets are provided along with this Reply. *See* Supp. Decl.

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Bowers Ex. A. Plaintiffs do not object to a short sur-reply to permit Defendants to respond to Plaintiffs' evidence of attorneys' fees.

III. CONCLUSION

The Court should grant Plaintiffs' motion to compel discovery.

DATED this 21st day of May 2025.

I certify that this memorandum contains 2,082 words, in compliance with the Local Civil Rules.

NICHOLAS W. BROWN
Attorney General of Washington

/s/ Andrew Hughes
WILLIAM MCGINTY, WSBA #41868
CYNTHIA ALEXANDER, WSBA #46019
TERA HEINTZ, WSBA #54921
ANDREW R.W. HUGHES, WSBA #49515
NEAL LUNA, WSBA #34085
CRISTINA SEPE, WSBA #53609
LUCY WOLF, WSBA #59028
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
360-709-6470
William.McGinty@atg.wa.gov
Cynthia.Alexander@atg.wa.gov
Tera.Heintz@atg.wa.gov
Andrew.Hughes@atg.wa.gov
Neal.Luna@atg.wa.gov
Cristina.Sepe@atg.wa.gov
Lucy.Wolf@atg.wa.gov
Attorneys for Plaintiff State of Washington

/s/ Colleen Melody
LAURYN K. FRAAS, WSBA #53238
COLLEEN MELODY, WSBA #42275
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
360-709-6470
Lauryn.Fraas@atg.wa.gov
Colleen.Melody@atg.wa.gov
Attorneys for Physician Plaintiffs 1-3

KEITH ELLISON
Attorney General of Minnesota

/s/ James W. Canaday
JAMES W. CANADAY (admitted pro hac vice)
Deputy Attorney General
445 Minnesota St., Ste. 600
St. Paul, Minnesota 55101-2130
651-757-1421
james.canaday@ag.state.mn.us
Attorneys for Plaintiff State of Minnesota

DAN RAYFIELD
Attorney General of Oregon

/s/ Allie M. Boyd
ALLIE M. BOYD, WSBA #56444
Senior Assistant Attorney General
Trial Attorney
1162 Court Street NE
Salem, OR 97301-4096
503-947-4700
allie.m.boyd@doj.oregon.gov
Attorneys for Plaintiff State of Oregon

PHIL WEISER
Attorney General of Colorado

/s/ Shannon Stevenson
SHANNON STEVENSON (admitted pro hac vice)
Solicitor General
LAUREN PEACH (admitted pro hac vice)
First Assistant Attorney General
Office of the Colorado Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
720-508-6000
shannon.stevenson@coag.gov
lauren.peach@coag.gov
Attorneys for Plaintiff State of Colorado